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No. 06-341

IN THE

Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AARP, AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, ASIAN AMERICAN JUSTICE CENTER, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, NATIONAL WOMEN'S LAW CENTER, PICK UP THE PACE, AND PUBLIC JUSTICE CENTER, IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law, AARP, American Association of People with Disabilities, Asian American Justice Center, National Association for the Advancement of Colored People, National Partnership for Women & Families, National Women's Law Center, Pick Up The Pace, and Public Justice Center respectfully submit this brief as *amici curiae* in support of Respondent pursuant to Supreme Court Rule 37.3(a), on the consent of the parties. *Amici* are interested in furthering the goal of Title VII of the Civil Rights Act of 1964 to eradicate employment discrimination.[1]

The Court's decision here will determine the scope of Title VII's power to combat illegal discrimination and will directly affect the rights of employees who suffer adverse employment action on the basis of race, sex, religion, national origin, or ethnicity. As such, this case directly impacts the constituencies served by the *amici*.[2]

Fuller statements of interest for all *amici* are included in the appendix to this brief.

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[1] Counsel for *amici* authored this brief in its entirety. No person or entity other than *amici*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with Clerk of the Court pursuant to Supreme Court Rule 37.3.

[2] Title VII provides the model for proving discrimination claims under other federal anti-discrimination laws, including the Americans with Disabilities Act, 42 U.S.C. §§ 12101, *et seq.* Thus, the Court's resolution of this case has implications for many employees who are not protected by Title VII but who experience circumstances of bias, like those at issue here, on other grounds.

SUMMARY OF ARGUMENT

This case provides the Court with an opportunity to clarify in case law what Congress has made clear in Title VII: an employer can be held liable for the bias of a supervisor if the bias was a motivating factor for an employment practice.

Under the 1991 amendments to Title VII, a plaintiff establishes an unlawful employment practice by demonstrating that race, color, religion, sex, or national origin was a "motivating factor" for any employment practice, even though other factors also motivated the practice. *Amici* ask the Court to hold that an employer can be held liable under the express language of Title VII for the bias of a supervisor, even when the ultimate decision-maker harbored no discriminatory motive toward the affected employee. In sum, an employer can—and should—be held liable whenever race or another prohibited criteria was a "motivating factor" in an employment decision, provided that applicable agency requirements are met.

Clarifying this principle will further Title VII's primary purpose to eliminate consideration of race, religion, sex, ethnicity, or national origin from employment decisions. Title VII tolerates no discrimination on these bases, subtle or otherwise.

Well-established agency principles impute to an employer the actions of an employee committed within the scope of employment, or those that are "aided by" the agency relationship. Accordingly, an employer may be held liable for acts committed by biased supervisors if such actions result in an adverse employment practice against an employee in a protected class. Contrary to Petitioner's argument (Pet. Br. At 21-24), a finding of agency does not hinge on whether the biased supervisor is the ultimate decision-maker.

Application of this standard will not increase employer liability for unlawful discrimination.

ARGUMENT

I. TITLE VII'S PRIMARY PURPOSE IS TO ELIMINATE THE CONSIDERATION OF RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN IN EMPLOYMENT DECISIONS.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989), Justice Brennan, writing for the plurality, stated:

> In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees... Congress' intent to forbid employers to take [any protected classification] into account in making employment decisions appears on the face of the statute.

With this observation, Justice Brennan articulated the primary purpose of Title VII. Title VII seeks to promote equal opportunity and eliminate race discrimination[3] by ensuring that an individual's membership in a protected class *never* factors into an employment decision.[4] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-01 (1973); 42 U.S.C. § 2000e–2(m).

This Court has recognized repeatedly that the central, driving, and primary purpose of Title VII is to eradicate

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[3] Title VII forbids the consideration of race, color, religion, sex, or national origin as a factor in an employment decision. For ease of discussion this analysis will simply reference its application as being based upon "race" or being "racial" unless specifically noted.

[4] Unless, of course, Congress has specifically allowed its limited use, as when religion, sex or national origin is "bona fide occupational qualification . . . ." 42 U.S.C. § 2000e-2(e). Further, like the *Price Waterhouse* Court, "[w]e disregard, for purposes of this discussion, the special context of affirmative action." *Price Waterhouse*, 490 U.S. at 228, 229 n.3 (plurality opinion).

employment discrimination by removing race from the decision-making equation. In the seminal case *McDonnell Douglas Corp. v. Green*, for example, the Court observed that it is "abundantly clear that Title VII tolerates *no* racial discrimination, subtle or otherwise." 411 U.S. at 801 (emphasis added). In *Price Waterhouse*, the Court's plurality also spoke directly to this issue, explaining "[w]e take these words [of 42 U. S. C. §§ 2000e-2(a)(1)] to mean that gender [or any protected classification] must be irrelevant to employment decisions." 490 U.S. at 240. Justice Rehnquist later similarly acknowledged in his dissent in *United Steelworkers v. Weber* that "this language prohibits a covered employer from considering race when making an employment decision...." *United Steelworkers v. Weber*, 443 U.S. 193, 220 (1979) (Rehnquist, J., dissenting).[5]

The 1991 Amendment to Title VII, enacted in part in response to the Court's decision in *Price Waterhouse*,[6] confirmed Congress' intent to forbid employers from using race, sex, or any other protected classification as a "motivating factor" in an employment decision. 42 U.S.C. § 2000e-2(m). In *Price Waterhouse*, the plurality had found that, even where an employer improperly relied on race as a factor in making an employment decision, the employer could escape liability if it could prove that race was not the sole, or "but for," cause of the decision. 490 U.S. at 258. Rejecting the plurality's interpretation of Title VII, Congress amended the statute in 1991 to clarify that the statute *never*

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[5] Although the Court in *United Steelworkers* ultimately found that employers *may* take race into account in the context of affirmative action programs redressing past discrimination, the future Chief Justice's argument that race should never be considered in an employment decision is still applicable in the non-affirmative action scenario.

[6] The Court acknowledged Congress' intent in enacting the 1991 Amendment in *Desert Palace v. Costa*, 539 U.S. 90, 94 (2003) ("[Section] 107 of the 1991 Act...'responded' to *Price Waterhouse*.").

tolerates the use of race as a factor in employment decisions. 42 U.S.C. 2000e-2(m).[7]

The primary purpose of Title VII is to eradicate discrimination, i.e., "to forbid employers to take gender [or any protected classification] into account in making employment decisions." *Price Waterhouse*, 490 U.S. at 239.[8] The Court has recognized that Title VII has secondary goals, as well. For example, encouraging the adoption of anti-discrimination policies, *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 764 (1998), and compensating victims of unlawful discrimination.[9] These other laudable objectives are

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[7] We address the purpose and effect of 42 U.S.C. 2000e-2(m) in more detail *infra* at 15-17.

[8] *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (finding that awards of back pay serve the "primary objective... 'to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees'" because it provides employers an incentive "to shun practices of dubious legality.") (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-430 (1971)); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 768 (1976), fn. 28 (finding that "seniority relief" serves both "the 'make whole' objective of the statute" as well as the "very heart of Title VII's primary objective of eradicating present and future discrimination.") (internal quotation marks omitted).

[9] Indeed, as the Court noted in *Albemarle Paper*, the prospect of having to pay monetary damages is an important incentive for employers:

> If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.

consistent with, but do not override Title VII's primary purpose of eliminating race as a consideration in employment decisions. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (stating that "the central statutory purposes of [Title VII are] eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination"). Contrary to Petitioner's arguments, anti-discrimination policies, even good ones, alone may not protect employees from unlawful discrimination.

When considered in light of Title VII's primary and secondary purposes, it is clear that Title VII should be enforced as it is written, so that employers may be held liable whenever race was a "motivating factor" in an employment decision, provided that applicable agency requirements are met.

II. TITLE VII PROVIDES FOR EMPLOYER LIABILITY FOR THE BIASED ACTIONS OF ITS SUPERVISORS

A. Well-established general agency principles apply to Title VII.

By defining "employer" to include an employer's "agent[s]," 42 U.S.C. § 2000e(b), Congress clearly intended that general principles of agency would apply in cases of unlawful discrimination by employers and their agents. The Court has consistently applied those principles in previous Title VII cases. *E.g., Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 754 (1998) ("We turn to principles of agency law, for the term 'employer' is defined under Title VII to include 'agents'.") The Court has previously recognized that agency principles impute to the employer the actions of a biased employee that culminate in an unlawful employment

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422 U.S. at 417-418 (quoting *United States v. N.L. Indus., Inc.*, 479 F. 2d 354, 379 (8th Cir. 1973)).

practice. *E.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 791 (1998) ("The very definition of employer in Title VII, as including an 'agent'. . . expressed Congress's intent that courts look to traditional principles of the law of agency in devising standards of employer liability in those instances where liability for the actions of a supervisory employee was not otherwise obvious."); *Ellerth*, 524 U.S. at 754. As this Court has further noted:

> An employer can, in a general sense, reasonably anticipate the possibility of such conduct occurring in its workplace, and one might justify the assignment of the burden of the untoward behavior to the employer as one of the costs of doing business, to be charged to the enterprise rather than the victim.. . . developments like this occur from time to time in the law of agency.

Id. at 798.

B. Imputation of bias under Title VII is not properly limited to situations where the final decision-maker is biased.

Petitioner's argument that only officially exercised, delegated authority of final decision-makers can be imputed to employers, and that a supervisor's biased reports about an employee cannot (Pet. Br. at 4-5, 11-21), is contrary to the plain language of the statute, and is inconsistent with the Court's precedents. This Court has previously recognized the applicability of the "scope of authority" and "aided by agency" forms of agency in the Title VII context. *See Faragher*, 524 U.S. at 791; *Ellerth*, 524 U.S. at 760. Limiting the application of agency principles to individuals who are the formal, ultimate decision-makers, as Petitioner seeks to do (Pet. Br. at 23), would be inconsistent with both of those agency principles. Moreover, such a limitation would frustrate the primary purpose of the statute, i.e., to eliminate discrimination, and would deprive plaintiffs of relief against employers who empower biased supervisors to cause

adverse employment actions based on discriminatory motives.

Employment decisions often involve input and action by a wide range of supervisory and human resources employees. This is increasingly true today, when so many companies maintain offices in multiple locations and employ hundreds, or even thousands, of employees. Neither the plain language of Title VII, general agency principles nor this Court's reasoning in *Faragher*, *Ellerth*, or *Meritor* limit agency to the "actual decision maker" or to the person with "principal responsibility" or to the person officially delegated to act, as the Petitioner seeks to do.

C. A supervisor's actions may be imputed to an employer when they fall within the supervisor's "scope of employment" or actual authority

The Restatement (Second) of Agency ("the Second Restatement") is a useful starting point for the content and application of general agency principles.[10] The Second Restatement provides that agency principles impute to an employer an employee's conduct when the employee's conduct occurred within the scope of his or her employment or when an employee's act has been "aided by" the agency relationship. Second Restatement § 219(1) ("A master is

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[10] *Ellerth* 524 U.S. at 755 ("[T]he Restatement (Second) of Agency (1957) (hereinafter Restatement), is a useful beginning point for a discussion of general agency principles."); *Faragher*, 524 U.S. at 792 ("[A]lthough we cautioned that "common-law principles may not be transferable in all their particulars to Title VII, we cited the Restatement §§ 219-237, with general approval.") (citing *Meritor*, 477 U.S. at 72). The Supreme Court has endorsed the approach in the Second Restatement but has not endorsed the Restatement (Third) of Agency cited by Petitioners. (Pet. Br. at 42.) Even under the Third Restatement, the actions of employees within "the scope of employment" are imputed to employers. *See* Restatement (Third) of Agency, §7.07 (2006).

subject to liability for the torts of his servants committed while acting in the scope of their employment."). The Second Restatement further states that, "[t]o be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized." Second Restatement § 229 (1).

Where bias taints an employment practice through the actions of a supervisor—such as the management and evaluation of subordinate employees—long-established agency principles dictate that the bias may be imputed to the employer. This is true even when the ultimate result of the lower-level supervisor's discriminatory actions is something the employer never intended, or even something the employer attempted to prevent.[11] An employer may well wish to prevent a supervisor from making biased reports or recommendations about a subordinate employee, but when a supervisor nonetheless does so, the supervisor's wrongful act is within his or her scope of employment because the supervisor has behaved illegally while undertaking exactly the kind of task the employer has authorized the supervisor to undertake.[12]

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[11] *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 544 (holding that the Second Restatement provided that intentional torts may be within the scope of an agent's employment "even if the employee engages in acts 'specifically forbidden' by the employer and uses "forbidden means of accomplishing results") (citing Second Restatement § 230); *Shager v. Upjohn Co.*, 913 F.2d 398, 406 (7th Cir. 1990) (holding an employee liable "as an agent acting within the scope of his authority, even though [his] conduct was willful and unauthorized") (citing Second Restatement § 231; Prosser & Keeton, ON THE LAW OF TORTS 505 (5th ed. 1984)), *cited in Faragher*, 524 U.S. at 791.

[12] On the facts here, all the relevant actions may properly be imputed to BCI under an actual authority analysis. Those acts include: (i) Mr. Grado's allegedly biased report of Mr. Peters' conduct; (ii) Ms. Edgar's cursory evaluation of Mr. Peters' conduct;

D. The "aided by agency" agency analysis addressed by the Court in *Faragher* and *Ellerth* is unnecessary here.

Because this case involves a supervisor, Mr. Grado, performing exactly the type of task that he was authorized to perform, i.e., reporting the alleged misdeeds of a subordinate employee, Mr. Peters, it falls squarely within the "scope of authority" or "actual authority" agency analysis.[13] The Court does not need to consider the "aided by agency" agency analysis addressed by the Court in *Faragher* and *Ellerth*. Even under the Court's more limited "aided by the agency" analysis, however, Mr. Grado's actions could be imputed to BCI.

As explained in the Second Restatement section 219(2), an employee's actions may under certain circumstances be imputed to an employer, even if they fell outside the scope of his employment, if "the servant purported to act or to speak on behalf of the principal and

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(iii) Ms. Edgar's light reading of Mr. Peters' personnel file; (iv) Ms. Edgar's communication with Mr. Grado (but not Mr. Peters); and (v) Ms. Edgar's decision to terminate Mr. Peters. Each of the kinds of action taken by Mr. Grado and Ms. Edgar were tasks of the kind BCI delegated to them, and thus fell with the scope of their actual authority. Ms. Edgar, as a member of the human resources team, was expected to receive reports about employee conduct and take action in response to those reports. Likewise, Mr. Grado, as a supervisor, was authorized to manage, evaluate, and report the activities of his subordinate employees. His actions may properly be imputed to BCI even if BCI never gave Mr. Grado authority to carry out his supervisory tasks in a racially discriminatory way. *See, e.g., Kolstad*, 527 U.S. at 544; *Ellerth*, 524 U.S. at 756.

[13] The Court need not consider an employer's liability, if any, for non-supervisory co-workers at this time. Because the supervisor in this case, Mr. Grado, was acting well within the scope of his actual authority when he reported Mr. Peter's alleged insubordination, the Court need not consider when, if ever, an employer may be held liable for a non-supervisor's bias.

there was reliance upon apparent authority, or he was *aided in accomplishing the tort by the existence of the agency relation.*" (Emphasis added.) The "aided in the agency relation" standard is always met when a supervisor takes an action that results in a tangible employment action against a subordinate.[14] *See, e.g., Faragher*, 524 U.S. at 789 ("There is nothing remarkable in the fact that claims against employers for discriminatory employment actions with tangible results, like hiring, firing, promotion, compensation, and work assignment, have resulted in employer liability once the discrimination was shown."); *Ellerth*, 524 U.S. at 760 ("Every Federal Court of Appeals to have considered the question has found vicarious liability when a discriminatory act results in tangible employment action"). Although the "aided by" agency standard need not be addressed here, it is important to note that even in far more difficult cases such as *Faragher* and *Ellerth*, where the supervisor's discriminatory acts fell outside the scope of his authority,[15] the Court has

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[14] When, for example, a supervisor terminates an employee, a "tangible employment action" occurs. *Ellerth*, 524 U.S. at 762 ("Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates.") Adverse employment actions that fall short of termination, such as placing an employee on leave without pay or denying an employee a promotion, may also suffice to create liability under Title VII. *E.g., Sauers v. Salt Lake County*, 1 F.3d 1122, 1127 (10th Cir. 1993) ("[I]f the plaintiff can show that she suffered an economic injury from her supervisor's actions, the employer becomes strictly liable without any further showing").

[15] *Faragher* and *Ellerth* involved the unique situation of a hostile work environment, where a supervisor uses his authority *to harass* an employee based on a protected characteristic. By contrast, this case involves the more straight-forward type of workplace discrimination fully anticipated and addressed by the 1964 Civil Rights Act, i.e., where a supervisor discriminates against employees in a protected class while and in the context of the supervisor performing his or her delegated duties.

found that employers could nonetheless be found liable for those acts under the "aided by" agency analysis.

III. "MOTIVATING FACTOR" IS THE APPROPRIATE CAUSATION STANDARD FOR DETERMINING WHETHER A SUPERVISOR'S DISCRIMINATORY ACTIONS CAUSED AN ADVERSE EMPLOYMENT ACTION.

Section 2000e-2(a) prohibits employers from discriminating against employees "because of" race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). This language requires a plaintiff alleging racial discrimination in the workplace to demonstrate a causal link between race and an unlawful employment practice.[16] In 1991, Congress amended Title VII to clarify the causation standard required by Title VII. The 1991 amendment makes it explicit that an employer also may be found liable when it or its agents use race as a factor in making an employment decision.

Section 42 U.S.C. § 2000e-2(m)(1994) provides (emphasis added):

> Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice.

Thus, under Title VII, if a plaintiff proves that the defendant acted "because of" discrimination by showing that unlawful

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[16] *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001) (requiring a "causal connection" between the plaintiff's protected activities and the adverse employment action in a Title VII retaliation claim).

bias was "a motivating factor" in the employment practice at issue, the employer may be held liable.[17]

In *Desert Palace v. Costa*, 539 U.S. 90 (2003), the Court held that direct evidence is not required to entitle a plaintiff to a "mixed-motive" instruction. Prior to that holding, some courts had interpreted Title VII, based on *Price Waterhouse*, to require direct evidence of discrimination to prove a "mixed motive" claim, but only circumstantial evidence to prove a "single motive" claim. When this Court dispensed with the false evidentiary dichotomy, it took the first step towards recognizing that "single motive" and "mixed motive" cases do not require different standards of causation.[18] Regardless

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[17] In interpreting a statute, a court must first consider whether the statutory language has a plain and unambiguous meaning. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). If it does, the court must end its inquiry, so long as the statutory scheme is "coherent and consistent." *Id.* (internal quotation marks omitted). Whether language is plain or ambiguous is determined by reference to the language itself, the specific context in which the language is used, and the broader context for the statute as a whole. *Id.* at 341. Courts must presume that "Congress 'says in a statute what it means and means in a statute what it says there.'" *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). The fact that Congress added a separate, new statutory provision rather than amending the "because of" language in section 2000e-2(a) does not detract from this analysis. Section 2000e-2(a) applies only to unlawful employment practices committed by "employers." The prohibitions on unfair employment practices by employment agencies, labor organizations, and training programs are set forth in sections 2000e-2(b), (c) & (d) respectively. Clearly, Congress decided to save itself considerable trouble by amending section 2000e-2 once rather than four times.

[18] Following this Court's lead, several lower courts have moved towards dispensing with the false dichotomy between the causal standards traditionally applied to prove "mixed motive" and "single motive" claims. *See, e.g., Levias v. Texas Dep't of Criminal*

of the number of motives, reasons, or causes for an employment decision, whether race is a motivating factor is the key question under Title VII. *Costa*, 539 US at 98 ("Section 2000e-2(m) unambiguously states that a plaintiff need only 'demonstrat[e]' that an employer used a forbidden consideration with respect to "any employment practice.")

A. A "motivating factor" causes, contributes to, or influences the employment decision.

The legislative history underlying the 1991 Amendment illuminates the meaning of the causation standard implemented by the 1991 amendment:

> [T]he complaining party must demonstrate that discrimination actually contributed or was otherwise a factor in an employment decision or action. Thus, in providing liability for discrimination that is a "contributing factor," the Committee intends to restore the rule applied in many federal circuits prior to the Price Waterhouse decision that an employer may be held liable for any discrimination that is actually *shown to play a role* in a contested employment decision.

H.R. Rep. No. 102-40(I), at 48 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 586 (emphasis added).

The language of 42 U.S.C. §§ 2000e-2(a)(1) and 2000e-2(m) clearly states that an employee need not demonstrate that race was the sole cause of the employment practice of which the employee complains. 42 U.S.C. § 2000e-2(a)(1) does not use the language *"solely because of."* In fact, Congress specifically rejected an amendment to Title VII that

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Justice, 352 F.Supp. 2d 751, 764 (S. D. Tex. 2004); *Dare v. Wal-Mart Stores*, Inc., 267 F. Supp. 2d 987, 991 (D. Minn. 2003) (concluding that, in light of *Desert Palace*, "The dichotomy produced by the McDonnell Douglas framework is a false one.").

would have placed the word "solely" in front of the words "because of." *See* 110 CONG. REC 2728, 13837 (1964).

In *Price Waterhouse*, a plurality opinion, Justices Brennan, O'Connor, and White all agreed that "because of" in §2000e-2(a) did not mean "sole" causation. They differed, however, on how "because of" should be interpreted. Justice Brennan argued that "because of" did not mean "but for" causation, stating that courts should look to see if a protected characteristic was a "motivating factor" in the employment decision. Justice Brennan defined "motivating factor" as those situations where a protected characteristic "played a part in the employment decision[.]" 490 U.S. 228, 246 (1989) (opinion of Brennan, J.). Justice O'Connor, on the other hand, argued that "because of" *did* signify something close to "but for" causation. *Id.* at 262. (opinion of O'Connor, J.). Her Honor concluded that courts should look to see if "a forbidden factor played a *substantial role* in the employment decision," rather than whether it played any role at all. *Id.* at 269 (emphasis added). Justice White agreed with Justice O'Connor that "substantial factor" was the appropriate causation standard. *Id.* at 259 (opinion of White, J.). Justice Kennedy, in a dissenting opinion joined by two other Justices, argued that the "because of" language of Title VII mandated a "but-for" causation approach. *Id.* at 282.

Two years after the Court rendered this highly fractured plurality decision, Congress clearly and precisely endorsed Justice Brennan's interpretation of "because of" in the 1991 Civil Rights Act. Responding directly to *Price Waterhouse*, Congress wrote into the statute the "motivating factor" language used by Justice Brennan. In choosing that language, Congress explicitly rejected the "but for" or "substantial" causation approach Justice O'Connor and Justice White had espoused, and endorsed Justice Brennan's "played a part" standard instead. Any attempt to prove that causation requires something more than "motivating factor" is simply a futile attempt to reargue *Price Waterhouse*.

Congress has long since resolved the debate in favor of "motivating factor" when it enacted §2000e-2(m). The 1991 amendment precludes forcing a plaintiff to rely on the "but for" causation standard to determine whether an unlawful employment practice occurred "because of" race. See 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(m).

The 1991 amendment also gives employers an important safeguard to protect against substantial liability in certain cases. Specifically, the amendment permits an employer to demonstrate that it would have taken the same action in the absence of the impermissible motivating factor. If the employer is successful in its showing, then the employer's liability is limited to specific equitable relief and attorneys' fees and costs rather than an award of monetary damages. In other words, under the amendment, employers can seek to limit liability (by demonstrating a lack of "but for" causation) even where they cannot escape it. See 42 U.S.C. § 2000(e)-5(g)(2)(B); Costa, 539 US at 94-95. The 1991 amendment provides:

> On a claim in which an individual proves a violation under section 2000e–2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e–2(m) of this title; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment[.]

42 U.S.C. 2000e–5(g)(2)(B). As the text of the amendment makes clear, "but for" causation has been relegated to a question of damages.

The correct interpretation of sections 2000e-2(a)(1) and 2000e-2(m) means that an employment practice is

unlawful if: (i) race is a motivating factor of an adverse employment practice; and (ii) the facts show that an employer did not somehow break the causal link between race and the adverse employment practice.

B. In addition to the explicit language of Title VII, ample case law justifies holding employers liable where a supervisor's racial animus was a "motivating factor" in an unlawful employment practice.

1. Employer liability for supervisor bias has been endorsed by all the Circuit Courts of Appeals to have considered the issue.

Every circuit to address the issue of an employer's liability for the bias of a subordinate has recognized some version of the "cat's paw," "rubber stamp," or subordinate supervisor liability doctrine. *Santiago-Ramos v. Centennial*, 217 F.3d 46, 55 (1st Cir. 2000); *Abramson v. William Paterson Coll. of New Jersey*, 260 F.3d 265, 286 (3d Cir. 2001); *Hill v. Lockheed Martin*, 354 F.3d 277, 288 (4th Cir. 2004); *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354-55 (6th Cir. 1998); *Willis v. Marion Cty. Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1323 (8th Cir. 1994); *Bergene v. Salt River*, 272 F.3d 1136, 1141 (9th Cir. 2001); *English v. Colo. Dept. of Corrections*, 248 F.3d 1002, 1011 (10th Cir. 2001); *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999); *Griffin v. Wash. Convention Ctr.*, 142 F.3d 1308, 1312 (D.C. Cir. 1998).

Although the circuits have employed myriad terms to define precisely when and how the theory is to be applied, all of the Circuit Courts of Appeals to have considered the

issue[19] have held that liability under the doctrine ultimately hinges on some formulation of a causation analysis.[20] Apart from the Fourth Circuit's decision in *Hill*, 354 F. 3d at 286, discussed *infra* at p. 22, the general consensus of the Circuit Courts of Appeals is that causation is the critical element of the analysis, and this emphasis is squarely rooted in the statutory language of 42 U.S.C. 2000e-2(a)(1) (forbidding employer to discharge an employee "*because of* such individual's race.") (emphasis added).

2. An "influence" can be a cause and a motivating factor.

Simply stated, the basic inquiry in a subordinate supervisor liability case is "whether the biased supervisor's discriminatory reports, recommendation, or other actions caused the adverse employment action." *EEOC v. BCI Coca Cola*, 450 F.3d 476, 487 (10th Cir. 2006). Consensus on causation has not compelled judicial consistency with the

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[19] The decision of the Ninth Circuit in *Bergene* represents an exception to this rule, concluding that an employer is liable under Title VII based on the mere "involvement" of a biased subordinate in an employment decision. *Bergene*, 272 F.3d at 1141. Other Ninth Circuit cases have accepted that causation is required when construing Title VII in the retaliation context. *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1065-1066 (9th Cir. 2003) (stating that, to make out a prima facie case of retaliation under Title VII, the plaintiff must demonstrate that "(1) she engaged in a protected activity, (2) she suffered an adverse employment action, and (3) there was a causal link between her activity and the employment decision.") (citing *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003)).

[20] As discussed *infra* at p. 21, *amici* disagree with the Tenth Circuit's assessment of the Fifth Circuit and other courts use of the influence standard as negating the element of causation. By definition, influence necessarily implies a causal connection. THE WEBSTER'S NEW WORLD COLLEGE DICTIONARY, 733 (4th ed. 2004), for example, defines "influence" as "the power of persons or things to affect others, seen only in its effects."

terminology used to define the appropriate causation standard. Regardless of linguistic inconsistencies, in practice the majority of courts rely on the same underlying principles in their inquiry by determining whether the plaintiff's protected class was a "motivating factor" in the final employment decision.[21] The Seventh Circuit, for example, has held that a showing by the plaintiff that a supervisor's recommendation, motivated by discriminatory conduct, was "a cause of [the plaintiff's] injury" is sufficient to impose liability on the employer, "whether or not [the formal decision maker] could reasonably be thought a mere cat's

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[21] *Santiago-Ramos v. Centennial*, 217 F.3d 46, 55 (1st Cir. 2000) ("[The plaintiff] can establish Centennial's stated reasons for her dismissal are a pretext for discrimination in a number of ways. One method is to show that discriminatory comments were made by the key decisionmaker or those in a position to influence the decisionmaker."); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000) ("[I]t is appropriate to tag the employer with an employee's age-based animus if the evidence indicates that the worker possessed leverage, or exerted influence, over the titular decision maker."); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 355 (6th Cir. 1998) ("We must therefore determine whether a reasonable jury could conclude that Gallagher was in a position to influence the alleged decision to deny [the plaintiff] the possibility of transferring to available positions within the company."); *Christian v. Wal-Mart*, 252 F.3d 862, 877 (6th Cir. 2001) ("[T]o complete a prima facie case under such circumstances, the plaintiff must offer evidence that the supervisor's racial animus was the cause of the termination or somehow influenced the ultimate decisionmaker."); *Griffin v. Wash. Convention Ctr.*, 142 F.3d 1308, 1312 (D.C. Cir. 1998) ("Thus do we join at least four other circuits in holding that evidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence."). *But see Hill v. Lockheed Martin*, 354 F.3d 277, 287 (4th Cir. 2004) ("The discrimination statutes . . . do not make employers vicariously liable for the discriminatory acts and motivations of everyone in their employ, even when such acts or motivations lead to or influence a tangible employment action.")

paw." *Lust v. Sealy*, 383 F.3d 580, 584 (7th Cir. 2004). The Third Circuit framed the test slightly differently while tackling the same fundamental idea, holding that "it is sufficient if those exhibiting discriminatory animus influenced or participated in the decision to terminate." *Abramson v. William Paterson Coll. of New Jersey*, 260 F.3d 265, 286 (3d Cir. 2001).

The requirement that a plaintiff must prove that discriminatory conduct influenced an employment practice, which is commonly accepted in these cases, requires a causal link short of the "but for" causation standard rejected by Congress in the 1991 amendments. *See* Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 Geo. L.J. 489, 506 (2006). The requirement that the discriminatory conduct must "influence" the decision encapsulates the motivating factor standard set forth in the 1991 Amendment to Title VII. Katz, 94 Geo. L.J. at 505-506 ("Congress said that [the motivating factor] test would be satisfied when a protected characteristic, such as race or sex, was a factor influencing the decision."). (internal quotation marks omitted)

3. The Tenth Circuit's decision below is ultimately consistent with the "influence" or "motivating factor" analysis utilized by other Circuit Courts of Appeals

The Tenth Circuit's decision is consistent with the "motivating factor" standard of causation. The court held that the employer's investigation was inadequate as a matter of law because it failed "to defeat the inference that Mr. Grado's racial bias *tainted* the decision." *BCI*, 450 F.3d at 492 (emphasis added). This language falls in line with the multitude of other courts to hold that if a plaintiff shows that discriminatory animus influenced the decision, the plaintiff will survive summary judgment.

Earlier in its opinion, however, the Tenth Circuit expressed disapproval of its sister circuits, which have held that summary judgment is improper if the biased subordinate "exerted influence" on the adverse employment action, opining that such an analysis "improperly eliminates a requirement of causation." *Id.* at 487. To the contrary, the concept of "influence" necessarily encompasses only those actions that produce an effect on the actions of others. The Tenth Circuit's misinterpretation of the decisions of its sister circuits led the court improperly to dismiss a standard that, when applied, comports with the unequivocal statutory language and Congressional intent behind Title VII.

Despite its mischaracterization of other circuits' decisions, the Tenth Circuit's ultimate holding is consistent in principle with the "motivating factor" standard of causation and its formulation in the other Circuit Courts of Appeals. *See BCI*, 450 F.3d 476. Thus, while Judge McConnell rejected the language of "influence," he did not reject its meaning. *Amici* agree with the Tenth Circuit that causation is required by the "motivating factor" standard. Where racism "influences" an outcome, however, race *is* causative.

4. The Fourth Circuit, an outlier in these cases, fundamentally misapplied the causation principles under Title VII and ignored the clear language of the statute.

The Fourth Circuit in *Hill v. Lockheed Martin* purported to apply the correct causation standard, stating that the employee "need not demonstrate that the prohibited characteristic was the sole motivating factor to prevail, so long as it was a motivating factor." 354 F.3d at 284. In application, however, the Fourth Circuit strayed radically from its sister circuits and the explicit language of Title VII. In requiring that the supervisory employee must be the "actual decision maker" to create liability for the employer,

the Fourth Circuit ignored the statutory directive and misconstrued the Supreme Court holdings in *Ellerth* and *Faragher*. The Fourth Circuit asserted that causation could be proven for purposes of Title VII only when the discriminatory motivations of the "actual decision maker" caused an adverse employment action. *Hill*, 354 F.3d at 291. In so doing, the Fourth Circuit failed to acknowledge the Supreme Court's recognition of employer liability when an agent misuses its authority to alter the terms and conditions of a subordinate's employment, even when no tangible employment action is taken.[22] *See Ellerth*, 524 U.S. at 765.

IV. IN PRACTICE, APPLICATION OF THE "MOTIVATING FACTOR" STANDARD OF CAUSATION WILL NOT INCREASE EMPLOYER LIABILITY FOR UNLAWFUL DISCRIMINATION

Consistent application of the "motivating factor" causation standard would significantly clarify the substantive rights of employers and employees in employment discrimination cases. As a practical matter, however, it would not alter the procedural landscape.

To prevail under a motivating factor analysis, the employee must demonstrate the following: (i) supervisor bias; (ii) an agency relationship to impute liability to the employer; and (iii) that the supervisor's action was a motivating factor for the ultimate employment decision. A jury must then ultimately conclude that race was a motivating factor.[23] Assuming the jury concludes that race was a motivating factor, in appropriate cases the employer

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[22] Of course, in *Ellerth*, the Supreme Court also mandated absolute employer liability when supervisor harassment "culminates in a tangible employment action." 524 U.S. at 765.

[23] At any time during the litigation, the trial court can, of course, apply the appropriate summary judgment analysis and determine whether there are contested issues of material fact warranting a decision by the fact finder and, if not, dismiss the claim.

may still be able to limit its exposure if it can prove that it would have taken the same action despite the consideration of race, i.e., if the employer can prove that the causal chain between the racist conduct and the employment decision has been broken. In such a case, Title VII would limit the plaintiff's remedies. 42 U.S.C. § 2000e-5(g)(2)(B). Where an individual proves a violation under section 2000e-2(m), the employer has a limited affirmative defense that does not absolve it of liability, but restricts the remedies available to a plaintiff if the employer is able to "demonstrate that [it] would have taken the same action in the absence of the impermissible motivating factor." *Id.*

Finally, assuming the employee clears all these hurdles, the employee's ability to obtain any type of punitive damages award is limited and takes into account all the employers policies and actions to prevent discrimination in the work place.[24] Title VII and the Court have properly balanced the employee's rights and employer's responsibilities through these proof requirements.

In practice, when the "motivating factor" standard is applied, an employer's non-discriminatory justification for taking action may, in an appropriate case, still entitle the defendant to summary judgment. For example, if an employer claims to have fired a plaintiff because he or she was caught stealing money from the company and the plaintiff admits to committing the impropriety (or the employer confirms the incident with a neutral third party),

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[24] In *Kolstad*, the Court found that although the petitioner may have established liability under Title VII, punitive damages could be limited. *Id.* at 544. ("Where an employer has undertaken such good faith efforts at Title VII compliance, it 'demonstrat[es] that it never acted in reckless disregard of federally protected rights."); *see also Harris v. L & L Wings*, 132 F.3d 978, 983 (4th Cir. 1997) ("In some cases, the existence of a written policy instituted in good faith has operated as a total bar to employer *liability for punitive damages.*") (emphasis added).

the plaintiff's claim may properly be subject to a motion for summary judgment.[25] In those cases in which disputed facts remain, however, the plaintiff still has the opportunity to show at trial that the employment decision was made, at least in part, because of his or her race. The plaintiff may satisfy this burden by "showing that the employer's proffered explanation is unworthy of credence," *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981), or by demonstrating that race was "a motivating factor" in the employment decision, 42 U.S.C. § 2000e-2(m).

V. IN EMPLOYMENT DISCRIMINATION CASES, EMPLOYER LIABILITY IS NECESSARILY BASED ON FACTUAL DETERMINATIONS, THUS A BRIGHT-LINE RULE CANNOT EFFECTUATE THE GOALS OF TITLE VII IN ALL WORKPLACES

Title VII commands actual non-discrimination, not the mere creation of anti-discrimination policies. BCI nonetheless argues for a bright-line rule that would allow the mere existence of these policies and any investigation into biased animus to insulate an employer from liability under Title VII. Such a holding would undermine the purposes of Title VII. Employers would simply need to demonstrate the existence of a policy and that the policy was followed to escape liability for even the most egregious of discriminatory acts. Not surprisingly, courts have flatly

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[25] A plaintiff may still be able to overcome such a showing by the employer if the plaintiff can demonstrate that the racist supervisor ignored similar violations by employees who were not in a protected class, or that the supervisor was motivated by racism when he or she reported the plaintiff's violation. *McDonald v. Santa Fe*, 427 U.S. 273 (1976). The possibility of liability in this scenario will encourage employers to institute policies or conduct investigations to ensure that employees in positions of authority do not punish or ignore violations by subordinates based on race.

rejected this formalistic and flawed interpretation of Title VII's requirements. As the Court stated in *Meritor*,

> [W]e reject petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability. While those facts are plainly relevant, the situation before us demonstrates why they are not necessarily dispositive.

477 U.S. 57, 72 (1986); *see also, e.g., Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 n.13 (5th Cir. 2000) ("If this were not so and we adhered to a rigid formalistic application, employers could easily insulate themselves from liability by ensuring that the one who performed the employment action was isolated from the employee, thus eviscerating the spirit of the 'actual decisionmaker' guideline.").[26]

Although an independent investigation of potential supervisor bias may be sufficient to break the causal chain in one case, it may be woefully insufficient in another, depending on the facts and circumstances of each case. As the unanimous Court so aptly explained just last year "[c]ontext matters. 'The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships . . . .'" *Burlington Northern v. White*, 126 S. Ct. 2405, 2415 (2006) (citing *Oncale v. Sundown Offshore Services, Inc.*, 523 U.S. 75, 81-82 (1998)). The existence of anti-discrimination policies, and what investigation an employer may, or may not have

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[26] *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354-55 (6th Cir. 1998) (holding that the "[decisionmaker] rule was never intended to apply formalistically, and [thus] remarks by those who did not independently have the authority or did not directly exercise their authority to fire the plaintiff, but who nevertheless played a meaningful role in the decision to terminate the plaintiff, [are] relevant.").

performed all may have relevance. Ultimately, the "context" in which these actions take place "matters" and requires a case-specific analysis that judges and juries can effectively perform.

The employment relationship is unique to each employer and its employees. And the facts surrounding "routine" employment decisions vary from workplace to workplace and from employee to employee. Although courts are not "super-personnel departments," they are charged with reviewing employment decisions that involve discrimination. *See Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1052 (8th Cir. 2006) (citing *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995)).[27] There is no one policy or type of investigation that, based on its mere existence, should insulate the employer from liability as Petitioner seems to suggest. Employment discrimination cases involve significant factual determinations, including factual determinations regarding the adequacy of any anti-discrimination policies both as written and as carried out in practice.

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[27] Furthermore, there is no guarantee that a workplace policy would be effective in preventing and rooting out discrimination. Some researchers suggest that many of these policies are no more than symbolic statements against discrimination, with no practical or deterrent effect. *See* John R. Sutton & Frank Dobbin, *The Two Faces of Governance: Responses to Legal Uncertainty in U.S. Firms, 1955 to 1985*, 61 AM. SOC. REV. 794, 800 (1996); Lauren B. Edelman, Howard S. Erlanger & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, Law & Soc'y Rev., Volume 27, Number 3, at 497 (1993).

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below, but make clear what Congress has made clear in Title VII: an employer can be held liable for the bias of a supervisor if the bias was a motivating factor for an adverse employment practice.

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APPENDIX

APPENDIX

List of *Amici*:

Organizations

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee, through its Employment Discrimination Project, has been continually involved in cases before the Court involving the proper scope and coverage afforded to federal civil rights laws prohibiting employment discrimination.

AARP is a nonprofit nonpartisan membership organization of more than 38 million people age 50 or older dedicated to addressing the needs and interests of older Americans. More than fifty percent of AARP's members remain active in the work force. For this and many other reasons, e.g., a majority of AARP members are female, growing numbers are members of racial or ethnic minorities, and a disproportional share of age 50+ workers have or will develop disabilities, AARP members rely on the protections of Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act and other federal laws prohibiting employment discrimination that will be affected by the Court's decision in this case. AARP has long

advocated broad interpretation and vigorous enforcement of these statutes, which are of paramount importance to all employed people, including millions of older workers, who look to them to deter, prevent, and remedy invidious discrimination in the work place.

The American Association of People with Disabilities ("AAPD") is a national membership organization that brings together people with disabilities, their family members and supporters to be a powerful force for change–politically, socially and economically. AAPD was founded on the fifth anniversary of the signing of the Americans with Disabilities Act and has a strong interest in full enforcement and implementation of all provisions of that law, including the employment non-discrimination proscriptions. The resolution of the legal standard at issue in this case will have a direct impact on the interpretation of the employment provisions in the ADA, which are modeled after Title VII of the Civil Rights Act of 1964.

The Asian American Justice Center ("AAJC") is a national non-profit organization whose mission is to advance the legal and civil rights of Asian Americans. AAJC and its affiliates have a long-standing interest in employment discrimination issues that have an impact on the Asian American community, and this interest has resulted in AAJC's participation in a number of amicus briefs before the courts.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social, and economic status of

minority groups; the elimination of prejudice; the publicizing of adverse effects of discrimination; and the initiation of lawful action to secure the elimination of age, racial, religious, and ethnic bias.

The National Partnership for Women & Families is a non-profit, national advocacy organization founded in 1971 that promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of women and people of color in employment.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity in the workplace, including through the full enforcement of Title VII of the Civil Rights Act of 1964, as amended. NWLC has prepared or participated in numerous *amicus* briefs involving sex discrimination in employment before this Court.

Pick Up the Pace is a San Francisco-based non-profit organization whose mission is to identify and eliminate barriers to women's advancement in the workplace, emphasizing the role of law in combating glass ceiling discrimination, gender stereotyping and work/family conflict. Established in 2005, the organization seeks to raise awareness of cutting edge gender bias issues in the

workplace through public education and legal advocacy, most recently as *amicus curiae* before this Court in *Burlington Northern & Santa Fe Railway Co. v. Sheila White* and *Ledbetter v. Goodyear Tire & Rubber Company, Inc.*

The Public Justice Center ("PJC") is a non-profit civil rights and poverty law organization dedicated to advancing the interests of and enforcing the rights of the under-represented. Established in 1985, the PJC has used impact litigation, public education, and legislative advocacy to accomplish law reform for its clients in the areas of workers' rights, civil rights, disability rights, housing, and children's rights. The PJC has also established an Appellate Advocacy Project to expand and improve the representation of indigent and disadvantaged persons and the presentation of civil rights issues before Maryland and federal appellate courts. The PJC represents low-wage, at-will employees in numerous cases involving wage and hour violations and race and gender discrimination and has a longstanding commitment to protecting civil rights in the area of employment. Its Appellate Advocacy Project has submitted or joined in a number of briefs of *amicus curiae* in recent cases involving the protection of workers' ability to seek relief for employment discrimination.